

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SIOBHAN MORROW, et al.,

Plaintiffs,

v.

16 CV 3340 (JPO)

ANN INC., A DELEWARE
CORPORATION,

Defendant.

New York, N.Y.
April 19, 2018
3:10 p.m.

Before:

HON. J. PAUL OETKEN,

District Judge

APPEARANCES

SCOTT & SCOTT, L.L.P. (NYC)
Attorneys for Plaintiffs

BY: JOSEPH P. GUGLIELMO
CAREY ALEXANDER

MORGAN, LEWIS & BOCKIUS LLP
Attorneys for Defendant

BY: GREGORY T. PARKS
KRISTIN M. HADGIS
REGINA SCHAFER-GOLDMANN

ALSO PRESENT: TODD CARPENTER

1 (Case called)

2 THE DEPUTY CLERK: Starting with the plaintiff,
3 counsel please state your name for the record.

4 MR. GUGLIELMO: Good afternoon, your Honor. My name
5 is Joseph Guglielmo. I'm with the law firm of Scott & Scott.
6 I'm here with my colleague, Carey Alexander, who is also with
7 Scott & Scott.

8 MR. CARPENTER: Good afternoon, your Honor. Todd
9 Carpenter with the law firm of Carlson Lynch Sweet Kilpela &
10 Carpenter.

11 THE COURT: Good afternoon.

12 MR. PARKS: Good afternoon, your Honor. Greg Parks
13 with Morgan, Lewis & Bockius on behalf of Defendant Ann Inc.
14 I'll allow my colleagues to introduce themselves.

15 THE COURT: Good afternoon.

16 MS. HADGIS: Good afternoon, your Honor. Kristin
17 Hadgis of Morgan, Lewis & Bockius for Defendant Ann Inc.

18 THE COURT: Good afternoon.

19 MS. SCHAFFER-GOLDMAN: Good afternoon, your Honor.
20 Regina Schaffer-Goldman, also with Morgan, Lewis, also for
21 Defendant Ann Inc.

22 THE COURT: Good afternoon, everyone. We're here for
23 a settlement hearing, a fairness hearing in this matter. I've
24 granted preliminary approval of the proposed settlement on
25 December 4, 2017. I've received documentation describing the

1 settlement, seeking approval of the settlement and approval of
2 the fee award requested by plaintiffs.

3 As I understand it, the settlement fund is valued at
4 \$6.1 million. It includes the option of a \$5 cash payment or
5 \$12 voucher, certain changes in practices by defendant, and
6 \$1,500 in cash, I believe, for each of the two plaintiffs as
7 service awards and a request for attorneys' fees and costs.

8 I'll ask counsel for plaintiff. Who is going to
9 speak, Mr. Guglielmo?

10 MR. GUGLIELMO: Your Honor, I was going to handle the
11 arguments and objectors relating to the fee, and I was going to
12 let my colleague, Mr. Alexander, handle the fairness of the
13 settlement.

14 THE COURT: Okay. Great.

15 Mr. Alexander, could you just describe generally first
16 the notice that went out and how the settlement will work.

17 MR. ALEXANDER: Yes. Absolutely, Your Honor. As to
18 the notice plan, it was executed in the form and manner that
19 was described in the declaration Carla Peak of KCC that was
20 approved as part of the preliminary approval order.

21 The notice plan had two main components. First there
22 was direct individual email and postcards notice to individuals
23 who were identified in Ann's business records. Second, there
24 was indirect notice that was also provided through the
25 settlement website.

1 KCC had sent out 5.4 million emails to class members
2 who were identified in Ann's business records and also sent out
3 one million postcards. As of the beginning of this week, the
4 settlement website has received almost 770,000 hits.

5 The settlement as a whole, as Your Honor has
6 recognized, provides the cash relief that is presumptively
7 valued at \$5 subject to a pro rata increase as allowed in the
8 fund, and the vouchers are presumptively valued at \$12. If
9 there are additional vouchers that are in the fund, the number
10 of vouchers that each plaintiff can receive will be increased
11 until the fund is exhausted.

12 THE COURT: So you can get up to two vouchers? Or can
13 you get more than that.

14 MR. ALEXANDER: You can get more than that. If the
15 distribution occurred today, plaintiffs electing to receive
16 vouchers would receive either five vouchers, or some would
17 receive six vouchers as well for a total recovery worth either
18 \$60 or \$72. So in any single transaction, plaintiffs can use
19 two vouchers at a time to purchase \$24 worth of merchandise.

20 THE COURT: What about the cash payment? Is there a
21 limit for each class member for the cash payment?

22 MR. ALEXANDER: It would be a one-time payment subject
23 to pro rata adjustment as necessary. If the distributions were
24 made today, we believe there is approximately \$3.89 left. So
25 each individual who elected to receive cash would receive a

1 payment of \$8.89.

2 THE COURT: What's the total amount of cash being paid
3 by defendant?

4 MR. ALEXANDER: It's \$1,000,000 -- \$500,000 into the
5 notice fund, \$500 into the cash fund separate and apart from
6 fees, expense, and awards.

7 THE COURT: So it's a total of \$1,000,000 by
8 defendant.

9 MR. ALEXANDER: Yes.

10 THE COURT: For everything.

11 MR. ALEXANDER: In terms of benefits made available to
12 the class, yes, from Ann's part of the settlement.

13 THE COURT: And then the fee award is on top of that?

14 MR. ALEXANDER: Yes. Separate and apart.

15 THE COURT: Okay. I think that answers my question.

16 Are you going to talk about objections and opt-outs?

17 MR. ALEXANDER: I'm happy to talk about the procedural
18 substantive considerations to the objectors as relates to the
19 motion for final approval.

20 THE COURT: I had seen three objections -- one by
21 Paula Leach, L-e-a-c-h; one by Pamela Sweeney, and one by Becky
22 Morrow. I assume no relation to the plaintiff Morrow.

23 MR. ALEXANDER: No.

24 THE COURT: Those are the objections. Are there any
25 other objections?

1 MR. ALEXANDER: Not that we're aware of.

2 THE COURT: Is there anyone here who is an objector?

3 MR. PARKS: No, your Honor.

4 THE COURT: How many opt-outs?

5 MR. ALEXANDER: There are 63 individuals who requested
6 exclusion.

7 THE COURT: I'll give you a chance to respond to
8 anything raised by the objectors.

9 MR. ALEXANDER: Unless your Honor has any specific
10 questions, we're comfortable with the arguments that we made in
11 the papers. We generally believe that Ms. Leach's arguments
12 actually argued in favor of granting settlement and finding
13 substantive fairness, and we otherwise don't believe that the
14 objections do have merit.

15 Again, as to Ms. Morrow's objections, they were
16 concerned partly that there would be insufficient funds in the
17 cash portion, the portion to all the class members, and the
18 data is showing right now that that is not the case at all.

19 We similarly believe she had also addressed the
20 propriety of the class certification. She invoked the Ninth
21 Circuit panel decision in *Hyundai*. We don't believe that's the
22 law in the Second Circuit here. We don't believe that it's
23 necessary to do a choice of law analysis. No party
24 defendants -- not Ms. Morrow, not any of the other objectors --
25 have identified any other law that potentially conflicts. So

we believe that New York law applies here.

THE COURT: Thank you.

MR. ALEXANDER: Thank you.

THE COURT: Do you want to address the attorneys' fee request?

MR. GUGLIELMO: Yes, your Honor. Thank you. This is Joseph Guglielmo with Scott & Scott.

Your Honor, as we set forth in our papers, we're seeking an award of \$1.525 million. That includes the expenses that we were seeking of approximately \$18,900. And we've set forth in the declarations of Daryl Scott and Gary Lynch the breakout of the attorneys and para professionals that have worked on this litigation.

Your Honor, we believe that the attorneys' fee is well within the range of the applicable Second Circuit benchmark of 25 percent. When you look at the total amount available to class members, the \$6.1 million, we believe that the \$1.525 million fee and expense request is approximately 25 percent of that.

We know that courts within this district will also sometimes include the fees as part of the percentage of the recovery approach. And if you were to take that approach, your Honor, the fee is actually 20 percent of the total amount made available.

Your Honor, in looking at the fee itself, in doing a

1 Lodestar crosscheck, we believe that that further supports
2 approval of the requested fee. It's approximately 1.7 to 1.8
3 of the Lodestar submitted, your Honor.

4 THE COURT: So the Lodestar total plus expenses is how
5 much?

6 MR. GUGLIELMO: The Lodestar total plus expenses I
7 believe is \$890,000, your Honor. So it would be proximately
8 1.70 something. I've forgotten the decimal. But it's about
9 1.7 and change.

10 If you look at that, your Honor, the cases that we
11 cited, both in our opening brief and in our reply, set forth
12 that in this district and in this circuit, multipliers from 2
13 to upwards of 6 have been awarded in cases.

14 In looking at the various Goldberger factors, we
15 believed that there was substantial risk at the time we brought
16 the case. We've expended tremendous amount of time and
17 resources. Your Honor, we did a very, very detailed factual
18 investigation before we filed this complaint.

19 We went around looking at the various stores where Ann
20 Taylor Loft and factory outlet merchandise was sold to
21 determine the scope and extent of the pricing scheme that we
22 alleged.

23 We looked at it over time, we studied it, and we were
24 able to develop the claims here to support our allegations and
25 demonstrate that the practices here that we believe we've

1 alleged, that Ann was engaged in a deceptive pricing scheme by
2 having certain of their products constantly offered for sale,
3 as well as advertising certain goods as being from an Ann
4 Taylor mainline store when it was from an Ann Taylor Outlet or
5 factory store.

6 One of the other things, your Honor, is in looking at
7 the fee award, not only the cash component but the injunctive
8 relief, as you noted in the beginning -- we believe it's very
9 significant. Although we didn't value it, it's a factor to
10 consider in awarding the fee.

11 In looking at the injunctive relief, we believe we've
12 gone right to the heart of the underlying claim. Ann has
13 agreed to change the labels, the price tags, associated with
14 the goods that they offer at the factory and outlet stores. So
15 there is not going to be any confusion.

16 Additionally, they've agreed to comply with the law
17 regarding pricing. So, in other words, the FTC provisions and
18 the California provisions we set forth in our complaint
19 regarding how pricing is to occur -- they've agreed to comply
20 with those particular provisions, your Honor. So we believe
21 that the perspective and injunctive has tremendous value and
22 further supports the fee.

23 If you'd like, your Honor, I can just briefly touch
24 upon the arguments raised by the objectors against the fee.

25 THE COURT: Yes. The one I'd like to focus on is I

1 haven't really dealt with coupon settlements before, and this
2 is one that has both a coupon piece and a cash piece obviously.
3 Coupon settlements are sometimes scrutinized closely by judges
4 on the theory that it's a benefit to the defendant often as
5 much as it's a benefit to the plaintiffs in the case, and my
6 main question about that is how to value that in terms of the
7 Lodestar. Is the \$6.1 million figure the right figure as the
8 denominator for purposes of thinking about the multiplier.

9 MR. GUGLIELMO: Your Honor, the first part of the
10 answer is these are not coupons. They're vouchers. There's a
11 difference. The material differences here -- what CAFA had
12 looked at and what the cases criticize in coupons that the
13 objectors cite to are cases where you have to come out of
14 pocket, in other words, 30 percent off, the coupons you get in
15 a circular -- that's a coupon. That's what CAFA warns against
16 because a class member then would have to go back to an entity
17 that allegedly committed a wrongdoing and purchase.

18 Here these are vouchers. No class member has to come
19 out of pocket. In connection with our due diligence and in
20 connection with the negotiations, we looked at the prices that
21 the Ann Taylor Loft and the Ann Taylor outlet stores charged,
22 and we were able to, through confirmatory discovery, identify
23 numerous products, hundreds of products, that were sold below
24 the \$12 point of the voucher. So class members have the
25 opportunity to obtain merchandise if they so choose without

going out of pocket. So that's why it's not a coupon. It's a voucher.

THE COURT: I'm confused. The difference is they can buy something for \$12 or \$24 --

MR. GUGLIELMO: Yes. \$12 or \$24 or less, and they don't have to come out of pocket. Coupons are basically you have to pay cash to get something. So the cases that are cited by the objectors are cases where someone gets 30 percent off an additional product. So, in other words, you had to buy \$12, and you get \$4 back. So you have to come out of pocket.

THE COURT: In this case there aren't many things you can buy for \$12, are there?

MR. GUGLIELMO: There are hundreds, your Honor. We did the due diligence in connection with the settlement. In fact, if you look at the allegations in the complaint, our clients purchased -- out of the five items that were purchased, three of them were purchased for under \$12.

So there are a number of accessories. There are tops. There are sweaters. There were hosiery. There were a number of garments. We did this in connection with our confirmatory discovery. We went out and went to the stores. We didn't just trust what Ann told us, and Ann provided us numerous skews, hundreds of skews, your Honor, where products were being offered.

The other thing that you can look at which basically

1 differentiates the case -- again, this is why the objectors'
2 arguments fall apart. They base the argument on this being
3 solely a coupon settlement. Even if it were a coupon
4 settlement, your Honor, which we do not believe it is, a
5 separate fund was created here.

6 In the *Blessing v. Sirius XM* case, your Honor, the
7 Second Circuit, basically the critical part is no part of
8 plaintiffs' fee application is attributable to an award of
9 coupons. It's a separately negotiated fee. So that's another
10 reason why the argument falls apart.

11 The third argument, your Honor -- and this is
12 something that was cited in another deceptive pricing case in
13 California was where there is an option to receive cash in lieu
14 of the voucher. And that's exactly what we've offered here,
15 your Honor.

16 So we believe these are not coupons. The reason why
17 is they're fully transferable. They are stackable. They can
18 be used to purchase a garment in full. We believe those
19 factors set apart, your Honor, the case law that talks about
20 coupons. We don't believe this is a coupon settlement.

21 In addition to that, as I said, we negotiated the fee
22 separately. So that, again, will set it aside under Second
23 Circuit law.

24 THE COURT: Are there circumstances under which there
25 is a reversion back to the defendant of any of the money?

1 MR. GUGLIELMO: None of the cash reverts, your Honor.
2 No. The million dollars at issue does not revert. The
3 \$500,000 fund and the monies towards the notice and
4 administration do not revert.

5 THE COURT: Okay.

6 MR. GUGLIELMO: Your Honor, if you'd like, I can
7 address briefly the remaining arguments. Again, most of the
8 arguments fall apart because they base their arguments on the
9 fact that either this is a coupon settlement, which it's not,
10 or they basically hypothesize about the fact -- and I think
11 they misconstrue what the settlement really is.

12 Ms. Sweeney actually states in her objection that she
13 doesn't think that these vouchers have real value or full
14 value. She doesn't explain what that means. They have real
15 value.

16 As I said, a class member can go to the store, once
17 they receive these vouchers, and purchase \$12 or \$24 of
18 merchandise, walk out of the store, and not come out of pocket.
19 So they don't have some theoretical or hypothetical value.
20 They have actual value. That is why, again, this is not a
21 coupon settlement, and that argument should be just dismissed.

22 The last argument I'll just raise briefly is
23 Ms. Morrow attacks the multiplier, 1.7. Your Honor, again, I
24 think that the cases we've set forth in our papers show that
25 the multiplier is well within the range of reasonableness in

the Second Circuit and in this district. I think the CVS case recently awarded a 6 multiplier.

Your Honor, if I can just briefly turn to the incentive awards, if that's okay.

THE COURT: Sure.

MR. GUGLIELMO: Your Honor, we're asking for modest incentive awards of \$1,500 to both Ms. Morrow and Ms. Gennock. They provided valuable assistance in this case. They were active participants, not only in the development of the facts, but they participated throughout the process of the case.

They provided documents. They engaged in discovery in providing this information for our initial disclosures. They participated in mediation. They came here, and they sat with us with Magistrate Judge Netburn and provided valuable insight as the class members in terms of their experiences with the Ann Taylor Loft and factory stores. They confirmed the facts underlying the claims, and then they assisted us in essentially putting together the voucher amounts that we negotiated with opposing counsel.

We believe that the amounts at issue, the \$1,500 each, are well within amounts that have been approved, your Honor, not only in this district but throughout other retail deceptive pricing cases, and we respectfully request that that be approved.

THE COURT: Thank you.

1 Counsel for defendant, Mr. Parks, you probably aren't
2 going to have much to say.

3 MR. PARKS: That's correct.

4 THE COURT: Other than opposing the fee award.

5 MR. PARKS: That's correct. We do support the
6 approval of the class. We do believe that it's fair,
7 reasonable, and adequate. I can certify to the Court that this
8 settlement was negotiated at arm's length between competent
9 counsel under the supervision of Magistrate Judge Netburn who
10 was good enough to spend an entire day with us and then also
11 follow up with us a few times on the phone in order to get this
12 done because it was very adversarial, but we did manage to get
13 it done.

14 As both parties cited in their papers, under the
15 *Wal-Mart v. Visa*, a Second Circuit case, there is a presumption
16 of validity that arises when the Court makes a finding that
17 there was arm's length negotiation among competent counsel.

18 The second thing I did want to say is I agree with
19 Mr. Guglielmo that this is not a coupon settlement. Coupons
20 certainly is that scenario in which what the retailer sends out
21 is \$10 off of a minium \$50 purchase or 20 percent off.

22 In that instance, the class member comes in, and they
23 have to spend \$40 of their own money in order to get something.
24 Here they have a \$12 voucher that they can use to buy hundreds
25 of products or they can use to buy a product that costs maybe

1 just a little bit more than the \$12 or the \$24 that they may
2 have.

3 The other thing I'd note on that point is that the
4 class members got a choice between whether they would get cash
5 or a voucher, and they got the choice between \$5 in cash or a
6 \$12 voucher or maybe multiple of \$12 vouchers.

7 To date from the claims we've seen coming in, over
8 65 percent of the class has actually elected the voucher. So
9 that demonstrates to the Court that the class sees real value
10 in the voucher.

11 This is a class of our customers. Ann Taylor Loft and
12 Outlet are both very fortunate in that they have a lot of
13 returning customers. They do have a lot of repeat customers.
14 So people who have purchased before will come and purchase
15 again. So that's why we see that they see real value in this.

16 Of course one of the Grinnell factors that the Court
17 needs to consider in a fairness opinion is the reaction to the
18 class. Here we can see the reaction of the class is they favor
19 the vouchers, and they see real value in the vouchers.

20 So for those reasons, I would agree that it's not a
21 coupon settlement and not subject to some of the criticisms
22 that attach to coupon settlements. Other than that, I'm happy
23 to answer any of your Honor's questions.

24 THE COURT: Okay. Thank you.

25 I'm going to approve the settlement. I find, having

1 considered in light of the Grinnell factors, that it is fair,
2 reasonable, and adequate. I take your all's point that this is
3 different than a coupon settlement. A voucher is different.
4 In some respects it has aspects that have been criticized like
5 a coupon, but this is different in significant ways I believe.
6 I think this is a good settlement.

7 The class members of course had the option of taking
8 cash. And it is noteworthy, as you all have pointed out, that
9 65 percent have chosen some form of the vouchers.

10 And I will note that part of my decision in finding
11 that this is a fair and reasonable and adequate settlement is
12 the fact that there were real challenges in pursuing the case,
13 including the fact that although I denied a motion to dismiss,
14 there are probably other judges who would see it differently,
15 whether there was injury or not, including the challenges that
16 would be faced by plaintiffs going forward and proving issues
17 like damages and causation. So I am going to approve the
18 settlement.

19 I'm going to reserve on the amount of fees. I might
20 want to look at cases a little bit more, but I am going to
21 approve the settlement. I'll be issuing an order shortly that
22 confirms it.

23 Anything else for today?

24 MR. PARKS: Yes, your Honor. I think the original
25 proposed form of order that we submitted to the Court had one

1 slight typo in it about the data that was used and the
2 information that was used, and then it also did not have a
3 finding by the Court that CAFA notice had been complied with.

4 CAFA notice has in fact been complied with. We've
5 submitted that to the Court. I think it would be appropriate
6 for the Court to have both of those things in a proposed final
7 order.

8 We can resubmit a proposed final order with those two
9 corrections in it, if that would be convenient to the Court, or
10 proceed however your Honor would like.

11 THE COURT: Anything else from plaintiffs?

12 MR. GUGLIELMO: No, your Honor.

13 THE COURT: If you all would confer and submit an
14 agreed-upon proposed order, that would be great.

15 MR. PARKS: Will do.

16 THE COURT: Thank you very much.

17 (Adjourned)